No. 20374

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant, vs. HOWARD C. HAYES, STANWOOD P. WHITELEY, et al, Appellees.	BRIEF FOR THE APPELLEES

On appeal from the United States District Court for the District of Alaska

R. BOOCHEVER
of Attorneys for Appellees

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No. 20374

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JURISDICTIONAL STATEMENT

Suit was brought in the United States District Court for the District of Alaska, at Juneau, seeking to recover a judgment from the guarantors of a loan made by the Reconstruction Finance Corporation to two corporations. Jurisdiction of the District Court was founded on 28 U.S.C. §1345. The District Court entered judgment dismissing the action with prejudice, on May 3, 1965. Notice of appeal was filed on July 6, 1965, but by affidavits subsequently submitted it appears that filing was made with the Clerk of the District Court in Anchorage, on July 1, 1965. The jurisdiction of this court on appeal rests on 28 U.S.C. §1291.

STATEMENT OF THE CASE

On May 28, 1953, Gastineau Corporation and Chichagof Corporation, a partnership doing business as Hayes & Whiteley

Enterprises, executed a promissory note in the amount of $49,200 to the Reconstruction Finance Corporation. The maturity of the note was December 15, 1955. Howard C. Hayes, Gladys Hayes, Stanwood P. Whiteley and Margaret Whiteley executed a guarantee of the above-mentioned promissory note on May 28, 1953.

In August, 1954, a receiver was appointed for the makers of the note, the Gastineau Corporation and Chichagof Corporation. (R. 17) Mr. Hayes and Mr. Whiteley were advised to stay away from the property of the corporations. (R. 18)

Various payments were made on the indebtedness by the receiver and trustee. (See Complaint, par. 5)[1/]

The predecessor of the plaintiff secured a judgment against the two corporations, which judgment was obtained by confession and included an allowance of $4,000 for attorney's fees and an additional sum of $4,968.49 for advances and expenditures by the plaintiff for the "care and preservation of the mortgaged property."

Prior to the receivership and bankruptcy, the property was worth $135,000 (R. 16) and appellees had each invested $39,000.00

1/ Payments appear also to have been made by other parties such as Tongass Timber Corporation, according to defendants' Answers to Interrogatories, which were not admitted into evidence, although referred to in appellant's brief.

in the corporations.

The property was visited by the appellees at the time that execution sale was contemplated, and they found that almost all of the valuable items were destroyed, damaged or missing. (R. 18, 27)

Appellees assisted the RFC in establishing its lien claim by furnishing an affidavit and were assured by a representative of the RFC in the presence of the attorney who handled the foreclosure for the RFC, that "as long as the property was so badly dissipated, he could see no way they could hold (appellees) personally responsible." (R. 27)

Appellees were not joined in the foreclosure action against the corporations, and as a result of the aforesaid assurance, appellees felt that they were relieved of responsibility and took no further action in the matter. (R. 29)

No suit was ever brought against the appellees by the RFC or by the Administrator of the Small Business Administration, but after the applicable Alaska statute of limitations, §09.10.050 AS, otherwise would have run against the defendants, suit was commenced by the United States in September, 1962, on their guarantees.

Paragraph 5 of the complaint sets forth the amount that appellant considered was unpaid on the note guaranteed by the appellees. This allegation was denied by the appellees in their Second Amended Answer and Affirmative Defense. A pre-

trial conference was held and appellant submitted a pre-trial memorandum stating, in part, "Plaintiff expects to prove the allegations set forth in its complaint which are not admitted by defendant's answer, to wit: Paragraphs 5 and 6."

At the commencement of the trial, the judge stated "... The contested issues of fact and law ... are ... the amount due as principal and interest to date from defendant to plaintiff." (R. 4) Attorney for appellant responded "I think the issues have been covered in the pre-trial memorandum and also in the court's present statement." (R. 5)

The appellant thereupon attempted abortively to prove the amount claimed to be due (R. 6-11) Objection was sustained as to the documentary evidence offered, (R. 7) and as to the testimony of a witness called by appellant. (R. 11) Appellant has not appealed from these rulings of the trial court. (See Specification of Error)

The court below found that certain payments had been made on the judgment obtained by appellant's predecessor (Par. 12, Findings of Fact); that plaintiff indicated its intention to prove the amounts due (Finding 13); unsuccessfully attempted such proof (Finding 15); and that evidence of the amount of payment on the note guaranteed by the appellees and on the judgment secured by plaintiff's predecessor on said note, was chiefly or entirely within the control of the plaintiff. (Finding 16)

The trial court concluded that under the facts and circumstances of this case, plaintiff had the burden of proving the amount due on the indebtedness guaranteed by the defendants and had failed to sustain that burden of proof.

From the judgment dismissing the action this appeal has been taken. 2/

SUMMARY OF ARGUMENT

Appellant contends that the District Court erred in ruling that under the facts and circumstances of this case the United States had the burden of proving the amount due on the judgment obtained on the indebtedness guaranteed by the defendants, and that the District Court erred in finding that the evidence of the amount of payment on the judgment was chiefly or entirely within the control of the United States. No proper specification of error has been set forth under the provisions of this court's rule 18 2(d), requiring that "where findings are specified as error the specification shall state as particularly as may be wherein the finding of fact and conclusion of law are alleged to be erroneous."

Appellant devotes but a minimum of space in its brief to arguing these focal points but devotes the weight of its argument to its contention that the judgment obtained against the

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2/ Appellant in its statement of the case (appellant's brief, p. 3) refers to "a Return on Execution" (Exhibit "E"). This statement is erroneous as the return was merely marked

principal debtors, the two corporations, is prima facie evidence of the liability of the guarantors and, further, is prima facie evidence of the amount of that liability.

The evidence established that the two corporations were placed in receivership in August, 1954, and that Mr. Hayes and Mr. Whiteley, the guarantors of the note, were advised to stay away from the property of the corporations. As a result they had no direct contact with the affairs of the corporations which subsequently were placed in bankruptcy. The undisputed evidence showed that the property which was mortgaged for $49,200 had a value of $135,000 and that Mr. Hayes and Mr. Whiteley had each invested $39,000 in the corporations. The evidence further indicated that at the time of the execution sale almost all of the valuable items were destroyed, damaged or were missing.

Suit initially was brought by the Small Business Administration against the two corporations. At the time the suit was filed the appellees were advised that they would not be held personally responsible for the reason that the property was "so badly dissipated."

Since the corporations were insolvent there was no reason for the trustee to oppose the suit and appellees having been advised that they were not to be held personally responsible, also had no reason to participate in the litigation. The

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for identification and was not admitted into evidence.

resulting default judgment was for $48,983.72 including items of $4,000 for attorney's fee and $4,968.48 for "care and preservation of the mortgaged property" which had been permitted to have been almost totally dissipated.

The complaint in the subject case against the guarantors was for $30,691.67, and appellees had no way of proving what payments had been made on the judgment or, for that matter, on the loan itself. Payments were made by other parties than the two corporations and the evidence of payment was obviously chiefly or entirely within the control of the United States. (See footnote 1, p. 2 supra)

Moreover, the case was tried by the United States on the theory that it had the burden of proof as to the amount of payments made. Thus at the pre-trial conference, the United States set forth in its memorandum that it expected to prove the allegations set forth in paragraph 5 of its complaint, which were denied by the appellees. Paragraph 5 set forth the amounts then alleged to be due on the judgment, and these allegations were denied in the answer.

The question of burden of proof with reference to the establishment of payments under these circumstances, is not dependent upon the general law pertaining to the effect of a judgment against a principal debtor in a subsequent action against a guarantor. We know from the pleadings in the subject case that payments had been made on the judgment and the evidence

of the amount of such payments was chiefly or entirely within the control of the United States. Nevertheless, under the circumstances of the subject case the judgment should not be regarded as prima facie evidence of liability of the guarantors or as to the amount of such liability, if any. The guarantors were lulled by the representative of the Small Business Administration and the attorney handling the case into the belief that they would not be held responsible. They thus had no incentive to participate in the action which resulted in a judgment including an allowance of $4,000.00 for attorney's fee in a default case and approximately $5,000 for fees for allegedly taking care of the property which had been dissipated. To permit such a judgment to be effective and binding on the parties who had been advised that they would not be held responsible, would be grossly inequitable. This is the type of case for application of the rule set forth in the American Law Institute's "Restatement of the Law", §139(3), holding that "where in an action by a creditor against a principal, judgment is obtained by default or confession against the principal, and the creditor subsequently brings an action against the surety, proof of judgment against the principal is evidence only of the facts of its rendition."

Furthermore, the subject action was commenced more than six years after the last payment had been made by the corporation debtors. If the action were between private parties

the statute of limitations had run so as to warrant judgment for the defendants. When the government through a corporation such as the Reconstruction Finance Corporation, enters into the realm of private business securing itself in the same manner as a private lender there is no reason why the same rules pertaining to limitation of actions should not apply; and the policy considerations in favor of the application of the general commercial rules far outweigh the outmoded decisions under which the sovereign has been held to be exempt from the statute of limitations.

ARGUMENT

I

THE DISTRICT COURT WAS CORRECT IN RULING THAT UNDER THE FACTS AND CIRCUMSTANCES OF THIS CASE, THE UNITED STATES HAD THE BURDEN OF PROVING THE AMOUNT DUE ON THE JUDGMENT OBTAINED ON THE INDEBTEDNESS GUARANTEED BY THE APPELLEES

From the time of the pre-trial conference in the subject case, the United States undertook to prove the amount due on its judgment. Having failed to sustain this burden of proof at the trial it contended for the first time that the burden of proof should be placed on the appellees. The District Court at the conclusion of the trial requested that briefs be submitted by the parties with reference to the issue pertaining to the burden of proving the amount due on the indebtedness guaranteed by the appellees. After submission of such memoranda and careful consideration thereof, the court found that the

plaintiff had the burden of proving the amount due on the indebtedness guaranteed by the defendants and that the plaintiff failed to sustain the burden of proof.

It is well established that

> "Appellate courts ordinarily give findings of fact made by the court in a case tried without a jury the same effect as would be given to findings of fact by a jury, consequently such findings are ordinarily not disturbed on appeal if they are supported by the evidence or at least by substantial evidence, even though there may also have been other conflicting evidence tending against the trial judge's conclusion." (5 Amer. Jur. 2d §839, p. 282)

Counsel admits "that a party having peculiar knowledge of a fact" often is held to have the burden of proving its existence or non-existence. Thus it follows that if the District Court's Finding No. 16 that the evidence of the amount of payment on the note guaranteed by the defendants and on the judgment secured by plaintiff's predecessor on said note was "chiefly or entirely within the control of the plaintiff" is supported by the evidence or substantial evidence, the judgment below should be affirmed.

A. THE RECORD AMPLY SUPPORTS THE COURT'S FINDING THAT EVIDENCE AS TO THE AMOUNT OF PAYMENT WAS CHIEFLY OR ENTIRELY WITHIN THE CONTROL OF THE PLAINTIFF.

Appellees were advised by a representative of the Reconstruction Finance Corporation in the presence of the attorney who handled the foreclosure, that

> "so long as the property was so badly dissipated he could see no way they could hold (appellees) personally responsible." (R. 27)

Appellees were not joined in the foreclosure action and were lulled into the assumption they would not be held personally responsible. From 1954 on appellees had been instructed to stay away from the property of the corporations and aside from visiting the property once shortly before the foreclosure sale, they stayed away. They thus had no means of keeping directly informed of the affairs of the corporations and at the time of the foreclosure suit in 1958, were led to believe that they had no further responsibility so that there was no reason thereafter to follow the matter closely. The answers to interrogatories which were furnished by the government and which are referred to in appellant's brief although not introduced into evidence, show that payments were made by parties other than the two corporations and specifically refer to payments by a Tongass Timber Corporation. The complaint itself seeks recovery for $30,691.57 together with interest, whereas the judgment obtained on April 5, 1958, totaled $48,983.72. Appellant in its brief, indicates that there was evidence submitted of the return of execution filed by the United States Marshal (R. 3). This is an erroneous statement as the return was marked for identification and never introduced into evidence. It thus appears from the complaint itself that payments had been made on the judgment. There can be no question but that the appellant had peculiarly within its power the ability to show the exact amount of payments and whether any amounts were due as of the date of trial.

Certainly, appellant was in a far better position to undertake this burden than were the appellees.

Moreover, the judgment obtained in the foreclosure action on April 5, 1958 introduced into evidence subject to objections as to relevancy and materiality as "Exhibit 'C'", provided for foreclosure of the mortgage on real property but did not provide for foreclosure of the chattel mortgage. The mortgage securing the note furnished by the corporations, was a real and chattel mortgage. At the time that the judgment was rendered Alaska provided for summary foreclosure of chattel mortgages.(See 22-6-10, Alaska Compiled Laws Annotated) This factor further emphasizes that the amount of payments received was peculiarly within the knowledge of the appellant.

It is recognized that the general rule is that the appellees in an action on a promissory note who assert that it has been paid in part or in full, has the burden of proving such payments. (See Vol. 8, Amer. Jur., §1035, p. 894)

There are well recognized exceptions to this rule and these exceptions apply with particular cogency to the facts here involved. Thus it is stated at 70 C.J.S., "Payment", §93(b), p. 302:

> "In accordance with the general rule that, where the evidence to prove a fact is chiefly, or entirely within the control of one party, it is incumbent on him to produce it, even though he has not the general burden of proof on the issue, as discussed in Evidence §113, it has been held that, where payment is asserted as a defense, but the proof of payment is in the exclusive knowledge

and control of plaintiff, the burden is on him to produce the evidence."

It is further stated therein:

> "As against a person other than the debtor, the burden of proving nonpayment of a debt is on the creditor."

This same rule of law is enunciated in 20 Amer. Jur., §139, as follows:

> "But when the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party which is in possession of the proof be required to adduce it, or, upon his failure to do so, it will be presumed that it does not exist, which of itself establishes a negative."

See also 31A C.J.S., "Evidence" §113.

Under similar circumstances, the United States Supreme Court as well as other jurisdictions consistently have held that the burden of proof lies with the party who is in possession of the proof.

Thus in the case of Selma, Rome & Dalton R.R.Co. vs U.S., (1891) 139 U.S. 560, 35 L. Ed. 266, the railroad sought to recover from the government a certain sum of money which it claimed was due for services of transporting mail during the years just prior to the taking over of the mail service by the Confederacy. An act of Congress permitted payment to the extent that payment had not been made by the Confederacy. The plaintiff contended that the burden of proof was on the United States which alleged that payment had been made, to

prove the amounts of such payments by the Confederacy. The court refused to place the burden of proof on the party claiming payment, stating at pages 566-578:

> "Besides, as the fact of payment or non-payment by the Confederate government was peculiarly within the knowledge of the claimant or within his power--if in the power of anyone--to establish, it may well be supposed that Congress intended that a claimant, as a condition of payment by the United States, should show that his demand belonged to the class for which the Act of 1877 provided. But there was no proof on the subject by the plaintiff, nor does it appear, if that fact were material, that such proof was impossible. It prepared the case and went to a hearing upon the theory that it was entitled to judgment, upon proof simply of the services rendered, unless the United States showed that the claim in suit has been, in fact, paid by the Confederate government. We cannot accept that interpretation of the Act."

In the case of U. S. vs. Denver & R. G. R. Co., 191 U.S. 84, at 92, 48 L. Ed. 106 at 109 (1903) the Supreme Court again stated:

> "It is a general rule of evidence, noticed by the elementary writers upon that subject (Greenl. Ev. §79) that 'where the subject-matter of a negative averment lies peculiarly within the knowledge of the other party, the averment is taken as true unless disproved by that part.' When a negative is averred in pleading, or plaintiff's case depends upon the establishment of a negative, and the means of proving the fact are equally within the control of each party, then the burden of proof is upon the party averring the negative; but when the opposite party must, from the nature of the case, himself be in possession of full and plenary proof to disprove the negative averment, and the other party is not in possession of such proof, then it is manifestly just and reasonable that the party which is in possession of the proof should be required to adduce it; or, upon his failure to do so, we must presume it does not exist, which of itself establishes a negative."

This general rule of law has been upheld by recent Supreme Court cases. Thus in United States v. New York, N. H. & H. R.R. Co., 355 U. S. 256 (1957), a railroad carrier was paid an earlier bill by the government. When a later bill was submitted the government offset part of the payment of the first bill contending that it had been overcharged on the first bill. The court held that the burden of proof was on the carrier to establish the fairness of its charge, stating:

> "The ordinary rule based on questions of fairness does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary."

(See footnote 5, 355 U.S. 256.)

The matter again was before the United States Supreme Court in the case of Campbell vs. United States, 365 U. S. 85, 5 L. Ed. 2d 428 (1960). This was a criminal case but the principle of law again was enunciated that

> " ... the ordinary rule based on questions of fairness does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of an adversary."

In the case of Schneider vs. Maney, (Mo. 1912) 145 S. W. 823, suit was brought on the basis of three judgments previously obtained on an administrator's bond. There were six sureties on the bond. Judgments were released as to all of the sureties except the defendant Maney who denied that there was the amount due as claimed by the plaintiff. The case thus was in almost identical posture with the subject case involv-

ing a suit against a surety (in effect a guarantor) based on a prior judgment. The issue was presented as to who had the burden of proof as to the payment. The court held, at page 824, 825:

> "Ordinarily payment is an affirmative plea, and the burden of proof is on the defendant; but there are exceptions to that rule, and this is one. Where the proof of payment is in the exclusive knowledge and control of the plaintiff, the burden is on him to produce it. The law is thus stated in 16 Cyc. 936: 'Where the party who has not the general burden of proof possesses positive and complete knowledge concerning the existence of facts which the party having that burden is called upon to negative, or where for any reason the evidence to prove a fact is chiefly, if not entirely, within the control of the adverse party, it has been held that the burden of proof (meaning the burden of evidence) is on the party who knows, or has special opportunity for knowing, the fact, even in criminal cases, although he is obligated to go no farther than necessity requires.' That is the doctrine of this court. Swinhart v. Railway, 207 Mo. 423, 105 S.W. 1043.
>
> "The evidence introduced by the plaintiff shows that five of the six sureties against whom these judgments were rendered have made payments and been released. How much those payments amount to is a fact peculiarly within the knowledge of the plaintiff; but he has seen fit to give no statement thereof, either in his pleading or proof. That is a matter not within the knowledge of the defendant."

In the case of State ex Rel Leary vs. United States, (La. 1938) 185 So. 69, 70, a bank secured judgment against one Parsons. The judgment was assigned to the plaintiff Leary who also secured another judgment against Parsons on which he levied execution. Junior judgment creditors claimed an amount in the sheriff's possession contending that the

prior judgment had been satisfied. The court although recognizing the general rule that the burden of showing payment of a judgment rests upon the party alleging it, held that:

> "The Bank, legally, was bound to know what happened, how much was paid it, and what became of the property it caused to be sold, and equitably it, or its assigns, should suffer the consequences for not showing the true facts.
>
> "The burden of proof lies with the party who is the most cognizant of the facts necessary to decide an issue."

In Peterson v. Wilbanks, 163 G. 462, 137 S.E. 69 (1927), a mortgage was foreclosed. A party who had purchased the property for value prior to the foreclosure defended on the ground that the mortgage had been paid. The court held:

> "As against a party other than the debtor the burden of proving non-payment of a debt is on the creditor."

Counsel contends that appellees could have secured information with reference to payments made through the trustee in bankruptcy. This assumes that the trustee would have had further interest in the matter after the foreclosure suit in which he defaulted, for the obvious reason that the corporations were hopelessly insolvent. There is no reason to believe that the bankruptcy file would contain information respecting payment of the judgment in question.

Counsel then attempts to equate the right of discovery with the duty of burden of proof. There are various purposes for exercising rights of discovery but one asking interrogatories is not bound by the answers thereto and the principal

reason for filing interrogatories is to secure admissions and material to be used in cross-examination. Counsel's argument could be used in almost any case to hold that the party holding the burden of proof should not be required to sustain that burden for the reason that the other party could have obtained the information by means of discovery.

Counsel also argues that if suit originally had been brought against the guarantors the government would have had to do no more than to present its note and the burden of proof would have shifted to the defendant. It therefore contends that its position should not be worsened by obtaining a judgment against the debtor. This begs the question as to whether the evidence is peculiarly within the power of one of the parties. If so, the burden would be placed on the party having such control of the evidence.

Under the circumstances of this case where the appellees had no connection with the property or the corporations involved after 1954, where the pleadings themselves reflect substantial payments; and where the evidence of those payments was chiefly or entirely within the control of the appellant, there was ample basis for the court's Finding No. 16 and its conclusion that the appellant had the burden of proving the amount due on the indebtedness guaranteed by the defendants. See G.E.J. Corp. vs. Uranian Aire, Inc., 311 F. 2d 749, 751, (9th Cir. 1963)

B. THE APPELLANT BY ITS CONDUCT IN THE TRIAL BELOW IS ESTOPPED FROM DENYING THAT IT HAD THE BURDEN OF PROOF OR IN THE ALTERNATIVE, HAS WAIVED CONTENTION THAT APPELLEES HAD THE BURDEN OF PROOF.

The rule is set forth in Barron & Holtzoff, "Federal Practice and Procedure", Vol. 1A, p. 844:

> "Stipulations and statements of counsel at a pre-trial conference are binding as respects to facts admitted or agreed or defenses waived."

In the case of U. S. v. Fallbrook Public Utility District, 165 F. Supp. 806, a stipulation by the United States Attorney in an action brought to determine water rights, that the United States was claiming no greater rights than a private owner of the land would have, was held to be as binding on the government as it would on a private litigant.

The plaintiff in the subject case having stated that it expected to prove the amount remaining unpaid on its judgment and having abortively attempted to make such proof, cannot be permitted now to contend that the burden of such proof was on the defendant.

The United States in paragraph 5 of its complaint, specified that certain payments were made on the judgment secured by its predecessor against the two corporations. In its pre-trial memorandum the United States stated, in part,

> "Plaintiff expects to prove the allegations set forth in its complaint which are not admitted by the defendant's answer, to wit: Paragraph 5 ..." .

The government unsuccessfully attempted to introduce

evidence at the trial in proof of the amount due on the judgment and the indebtedness guaranteed by the appellees. In that regard, no appeal has been taken from the ruling of the trial court holding that the evidence attempted to be elicited was inadmissible.

> "The trial court has the right during the proceedings of a cause, from its commencement to its final termination, to determine whether the language of a party or his counsel amounts to a waiver or estoppel." (88 C.J.S. §36, p. 96)

Where a case proceeds on the theory that certain facts are not in issue, proof of such facts will be deemed to have been waived.

It is stated at 88 C.J.S. §59, p. 165:

> "The necessity of introducing evidence to prove a fact may be waived by the adverse party, although evidence that is relevant cannot be kept from a jury by a waiver of proof if the other party desires the testimony out. An issue may be expressly waived during trial or impliedly waived by the manner in which the trial is conducted. ... Where a case proceeds on the theory that certain facts are not in issue, proof of such facts will be deemed to have been waived. ...
>
> "A party may be estopped to insist on the necessity of his adversary proving a fact. ...
>
> "A party having admitted a fact should not be permitted to introduce evidence to contradict the existence of such fact. ... "

Lafayette Trust Co. vs. Vail, 132 N.Y.S. 86, 147 App. Div. 173.

Accordingly, under the circumstances of the present case where from the pre-trial conference on the case was conducted on the theory that the government had the burden of proving the amount due on the note guaranteed by the appellees and the

judgment obtained against the corporations, the government now is estopped or in the alternative, has waived the right to contend that the burden of proving such amount was on the appellees.

II

THE APPELLANT'S SPECIFICATION OF ERROR NO. 2 IS DEFECTIVE UNDER THIS COURT'S RULES

Appellant's specification of error No. 2, reads:

> "The District Court erred 'in finding' that evidence of the amount of payment on the judgment was chiefly or entirely within the control of the United States."

Rule 18 2(d) of the United States Court of Appeals Rules for the Ninth Circuit, specifies, in part:

> "In all cases when findings are specified as error, the specification shall state as particularly as may be wherein the findings of fact and conclusions of law are alleged to be erroneous."

As noted above, the specification makes no effort to state wherein it is contended that the finding is erroneous. In the case of Thys vs. Anglo California National Bank, 219 F. 2d 131 (9th Cir. 1955), cert. den. 75 S.C. 875, 349 U. S. 946, 99 L. Ed. 1272, rehearing denied 70 S.C. 40, 350 U. S. 855, the court stated:

> "Here, appellants' first specification of error combines alleged errors as to five findings of fact, four conclusions of law, and two distinct questions relating to the admissibility of evidence. The specification does not, as this provision of the Rule requires, 'state as particularly as may be wherein the findings of fact and conclusions of law are alleged to

be erroneous.' Defects in this particular are not remedied by referring the reader to the pages of the brief where the points are argued."

III

UNDER THE CIRCUMSTANCES OF THIS CASE THE JUDGMENT AGAINST THE CORPORATIONS WAS NOT PRIMA FACIE EVIDENCE OF LIABILITY OR OF THE AMOUNT DUE

As pointed out above whether the judgment was prima facie evidence of the amount due is immaterial, under the circumstances of this case where the complaint itself showed that payments had been made on the judgment and the proof of the amount paid was peculiarly within the possession of the appellant. Nevertheless, under the factual context here involved the judgment should not be regarded as any proof of liability of the guarantors. The undisputed testimony was to the effect that the appellees co-operated with the government in establishing its lien claim and were advised that they could not be held personally responsible due to dissipation of the corporations' property. Under these circumstances, the appellees were lulled into ignoring the foreclosure action and the government proceeded to secure a default judgment not only for a substantial sum of money on its note, but, in addition, including a $4,000.00 attorney's fee and $4,968.49 allowance for alleged expenditures in caring for the mortgaged property which had been permitted to be almost entirely dissipated.

The rule set forth in American Law Institute's "Re-Statement of the Law", Security, §139(3) appears particularly applicable to this factual situation. It there is stated:

> "(3) Where, in an action by a creditor against a principal, judgment is obtained by default or confession against the principal, and the creditor subsequently brings an action against the surety, proof of the judgment against the principal is evidence only of the fact of its rendition." (page 372)

In its comment on this subject at page 375, The Re-Statement states:

> "The arguments of policy and convenience against duplication of trials have little weight where there has not been a determination after consideration of evidence introduced by both sides to a litigation. Such a judgment against the principal does not create a rebuttable presumption of the principal's liability, in an action between creditor and surety."

See Sutter v. Hill, 101 N.E. 2d 502, 504, (Ohio, 1950), Mamouth Lumber Co. vs. Indemnity Insurance Company, 21 N.J. 439, 122 A. 2d 604.

The Alabama rule set forth in the case of United States v. Maryland Casualty Co., 204 F. 2d 912 (5th Cir. 1953) almost certainly would be followed by the Alaska Supreme Court if it were to rule on the applicability of the judgment in the subject case under the circumstances here involved. Since the matter is one of substance it is controlled by Alaska law, (See 204 F. 2d 912, 915) and the Supreme Court of Alaska has not spoken as yet on the subject. The Alaska Supreme Court has shown its liberal tendencies and its reluctance to follow

stereotyped authority. (See Fairbanks v. Schaible, 375 P. 2d 201 (Alaska, 1962); Cramer v. Cramer, 379 P. 2d 95 (Alaska, 1963; Svacek v. Shelley, 359 P. 2d 127 (Alaska, 1961); Stephenson vs. Durion, 401 P. 2d 423 (Alaska, 1965)).

With reference to the effect of the judgment pertaining to the amount due, it could not constitute any evidence of the amount due in the subject case since the complaint itself shows that additional payments had been made. Moreover, counsel's authorities on this point are far from persuasive. Thus in the case of Home Insurance Company of New York v. Savage, 231 Mo. App. 569, 103 S.W. 2d 900, 901 (1937), the sureties were joined in the original suit. In the case of Lake County v. Massachusetts Bonding and Insurance Company, 84 F. 2d 115, it was held that the burden of proof was on the plaintiff to establish the amount due. The judgment against the principal was held to be prima facie evidence thereof. There was no situation such as that here involved where the complaint itself established that the judgment did not accurately reflect the amount due. Thus, in essence, the Lake County case supports appellees' position to the effect that the burden of proof was on the plaintiff.

CONCLUSION

There was ample evidence to justify the finding of the District Court that evidence of the amount of payment on the note guaranteed by the appellees and on the judgment secured against the corporations, was chiefly or entirely within the

control of the appellant. The appellant having undertaken the burden of proving the amount due and having failed in its efforts at such proof, may not now successfully contend that the burden should have been placed on appellees under the circumstances here involved. Accordingly, it is respectfully submitted that the judgment below should be affirmed.

Respectfully submitted,

FAULKNER, BANFIELD, BOOCHEVER & DOOGAN

By R. Boochever
R. Boochever
of Attorneys for Appellees

CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with these rules.

R. Boochever
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